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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/722,359	11/25/2003	Michael A. Porter	10790-067001	4715

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EXAMINER	
WEIER, ANTHONY J	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 07/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/722,359	PORTER, MICHAEL A.	
	Examiner	Art Unit	
	Anthony Weier	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11 May 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-47* is/are pending in the application.

4a) Of the above claim(s) *15-19 and 21-40* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-14, 20, and 41-47* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. This application contains claims drawn to an invention nonelected with traverse in the paper filed 10/28/05. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., In re Berg, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); In re Goodman, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); In re Longi, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); In re Van Ornum, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-8, 20, 41, and 45-47 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-8, 10-16, and 19-43 of copending Application No. 10/432094. Although the conflicting claims are not identical, they are not patentably distinct from each other because the

instant claims call for a product that has a particular gel breaking strength, dispersion viscosity, ESI, bacterial load, and food applications. However, determination of such characteristics would have been well within the purview of a skilled artisan, and it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the products of the instant invention to include such degree of attributes as a matter of preference.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

4. Claims 42-44 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-8, 10-16, and 19-43 of copending Application No. 10/432094 taken together with either one of Altemueller et al (U.S. Patent No. 6423364) or Porter et al (U.S. Patent No. 6841184).

The claims of copending Application No. 10/432094 are silent regarding inclusion the modified oilseed material in meat, meat analog, soup, sauce, or dressing applications as called for in claims 42-44. Altemueller et al teaches the inclusion of functional soy material in a variety of foods including meat, meat-related, and sauces. Porter et al teaches the inclusion of modified oilseed material in meat, meat analog, soup, sauce and dressing applications (cols.12 and 13). It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the protein material in such food products as a matter of preference within known food application of the prior art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

5. Claims 1-14, 20, 41, and 44-47 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims of U.S. Patent No. 6841184. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims call for a product that has a particular gel breaking strength, dispersion viscosity, ESI, bacterial load, and food applications. However, determination of such characteristics would have been well within the purview of a skilled artisan, and it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the products of the instant invention to include such degree of attributes as a matter of preference.

6. Claims 42 and 43 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of U.S. Patent No. 6841184 in view of Altemueller (U.S. Patent No. 6423364).

The claims further call for the inclusion of said oilseed material in meat and meat analog products. Altemueller et al teaches the inclusion of functional soy material in a variety of foods including meat, meat-related, and sauces. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the protein material in such food products as a matter of preference within known food application of the prior art.

7. Claims 1-14, 20, 41-43, and 45-47 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims of U.S. Patent

No. 6830773. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims call for a product that has a particular gel breaking strength, dispersion viscosity, ESI, bacterial load, and food applications. However, determination of such characteristics would have been well within the purview of a skilled artisan, and it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the products of the instant invention to include such degree of attributes as a matter of preference.

8. Claim 44 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of U.S. Patent No. 6841184 in view of Altemueller et al (U.S. Patent No. 6423364).

The claims further call for the inclusion of said oilseed material in sauce material. Altemueller et al teaches the inclusion of functional soy material in a variety of foods including sauces. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the protein material in such food products as a matter of preference within known food application of the prior art.

Claim Rejections - 35 USC § 102

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States

only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

10. Claims 1-14, 41, and 45-47 are rejected under 35 U.S.C. 102(b) as being anticipated by Lawhon (U.S. Patent No. 4420425).

Lawhon discloses a modified oilseed material comprising the amount of protein in the amount of molecular weight and NSI as called for in the instant claims wherein said material is spray-dried and used in food products (e.g. col. 6, lines 23-25; col. 15, lines 23-30; Example 1). Due to the similarity in processing between that of the instant invention and that of Lawhon, it is expected that the material therein would possess the particular dispersion viscosity, gel-breaking strength, emulsion stability index, flavor components, and bacterial load (due to heat exposure) as called for in the instant claims.

11. Claim 20 is rejected under 35 U.S.C. 102(e) as being anticipated by Muralidhara et al (U.S. Patent No. 6630195).

Muralidhara et al discloses a modified oilseed material comprising the amount of protein in the amount of molecular weight and NSI as called for in the instant claims wherein said material is spray-dried and used in food products (e.g. col. 3, lines 1-44; Table 6). In addition, Muralidhara et al discloses the use of said material in meat products (col. 18, lines 1-4). Due to the similarity in processing between that of the instant invention and that of Muraldihara et al, it is expected that the material therein would possess the particular dispersion viscosity, gel-breaking strength, emulsion stability index, flavor components, and bacterial load (due to heat exposure) as called for in the instant claims.

12. Claims 1-14, 20, 41, 42, and 44-47 are rejected under 35 U.S.C. 102(e) as being anticipated by Stark et al (U.S. Patent No. 6599556).

Stark et al discloses a modified oilseed material comprising the amount of protein in the amount of molecular weight and NSI as called for in the instant claims wherein said material is spray-dried and used in food products (e.g. Abstract, col. 7, lines 1-20; Examples). In addition, Stark et al discloses the use of said material in meat and sauce products (col. 18, lines 1-4). Due to the similarity in processing between that of the instant invention and that of Stark et al, it is expected that the material therein would possess the particular dispersion viscosity, gel-breaking strength, emulsion stability index, flavor components, and bacterial load (due to heat exposure) as called for in the instant claims.

Claim Rejections - 35 USC § 103

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

14. Claims 42-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lawhon alone or taken together with Altemueller et al (U.S. Patent No. 6423364) or Porter et al (U.S. Patent No. 6841184).

Although Lawhon discloses inclusion of said protein material in food, it is silent regarding inclusion in meat, meat analog, soup, sauce, or dressing applications as called for in claims 42-44. Altemueller et al teaches the inclusion of functional soy

material in a variety of foods including meat, meat-related, and sauces. Porter et al teaches the inclusion of modified oilseed material in meat, meat analog, soup, sauce and dressing applications (cols.12 and 13). It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the protein material in such food products as a matter of preference within known food application of the prior art.

15. Claim 43 is rejected under 35 U.S.C. 103(a) as being unpatentable over Stark et al alone or taken together with Altemueller et al (U.S. Patent No. 6423364) or Porter et al (U.S. Patent No. 6841184).

Although Stark et al discloses inclusion of said protein material in food including meat, it is silent regarding inclusion in meat analog applications as called for in claim 43. Altemueller et al teaches the inclusion of functional soy material in a variety of foods including meat, meat-related, and sauces. Porter et al teaches the inclusion of modified oilseed material in meat analog applications (col.13). It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the protein material in such food products as a matter of preference within known food application of the prior art.

Response to Arguments

16. Applicant's arguments filed 5/11/06 have been fully considered but they are not persuasive.

Applicant argues that Lawhon and Stark et al do not describe the same process wherein it could be determined unequivocally and unambiguously that the product

therein would inherently possess the attributes set forth in the instant claims. Lawhon and Stark et al each discloses a modified oilseed material prepared in a very similar manner to that of the instant invention, and, based on this information, it is reasonable to expect that same would have the same attributes of viscosity, emulsion stability index, gel breaking strength, flavor components, and bacterial load as called for in the instant claims. The Examiner does not have a lab to be able to show the product of Lawhon and Stark et al having the same product attributes as set forth in the instant claims. Although changes in processing can make for product possessing different degrees of certain attributes, there has been provided no evidence or attempt to provide evidence that this is the case between the instant claims and that of Lawhon. The assertion has been that there is not enough information to presumably replicate the processes in Lawhon and Stark et al. The Examiner disagrees as each reference is fairly thorough in describing the way in which the product is produced (see Examples). It would appear that a comparison of the product of Lawhon and that of the instant invention would be relatively easy to demonstrate in a lab to confirm Applicant's assertions that they are not the same product within the scope of the instant claims as presently recited.

Applicant argues that Stark et al and Muralidhara et al each use temperatures that are not as high as that of the instant invention and that because Stark et al refers to same as being "very effective", one of skill in the art would not be motivated to increase the temperature. Nevertheless, Applicant has failed to show that the instant invention kills more bacteria than following the inventions of Stark et al and Muralidhara et al. It is

expected that the kill value would be as good or surpass that required in the instant claims due to the reference to such pasteurization being "very effective". Clearly, the same kill value can be attained using different temperatures while inversely playing with the contact times.

Applicant argues that the none of the applications/patents applied in the double patenting rejections refer to gel strength, ESI or dispersion velocity nor the method of heating the protein-enriched retentate. It should be noted, however, that it is expected that such characteristics of the instant claims fall within are reasonably close to the scope of the claims as applied from said applications/patents due to the similarity in the claimed products. Applicant has not set forth evidence that the claims of the applications/patents could not possess or be made to possess such instant characteristics.

Conclusion

17. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier
Primary Examiner
Art Unit 1761

Anthony Weier
July 19, 2006

7/19/06